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No. 80-2113

In the Supreme Court of the United States

OCTOBER TERM, 1980

J. W. BATESON, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner claims that it was denied due process because (a) the dispute resolution clause of its government contract does not permit resolution of all contract claims and (b) the government prevented petitioner from proving the amount of damages suffered as a result of the modification of the contract. Neither of these questions is presented by the record in this case, and the Court of Claims decision does not otherwise warrant review.

1. Petitioner contracted with the Department of the Army to build a hospital at Fort Gordon, Georgia (Pet. App. 25). The hospital was to include a "nurse call" system (*ibid.*); responsibility for the nurse call system was in turn subcontracted to Fidelity Sound, Inc. (*id.* at 26).

Under the contract the nurse call system was to be approved by the Army contracting officer before installation. Through petitioner, Fidelity submitted several proposals during a ten-month period for the nurse call system

that were rejected. Finally, in September 1972, Fidelity submitted the Executone nurse call system, which was approved. Shortly after approval of the Executone system, the contract specifications for the nurse call system were modified to require a more elaborate and expanded system. Accordingly, the contract price was increased by $225,000, subject to final adjustment. The contract modification noted that the proposed Executone system had been conditionally approved (Pet. App. 27-29).

The dispute resolution provision of the contract (Pet. App. 18-20) provides, in pertinent part, that "[e]xcept as otherwise provided in [the] contract, any dispute concerning a question of fact arising under [the] contract which is not disposed of by agreement shall be decided by the Contracting Officer * * *." Compare 41 U.S.C. (Supp. III) 605(a). The dispute resolution clause also provides for administrative review of the contracting officer's decision and contemplates limited judicial review of the agency decision (Pet. App. 18-19). See 41 U.S.C. 321, 322; compare 41 U.S.C. (Supp. III) 606, 607(g).

In accordance with the dispute resolution provision, Fidelity submitted a claim for increased costs and expenses of $236,757 to the contracting officer, citing the "interpretation and ambiguity of the [contract] specifications" as the reason for the increased costs (Pet. App. 29-30); the claim was later increased to $570,030 (*id.* at 31). The contracting officer denied the claim. On appeal, the Armed Services Board of Contract Appeals reversed, holding that petitioner was entitled to an equitable adjustment in the contract price because of the contracting officer's erroneous interpretation of the nurse call system specifications (Pet. App. 32). *In re J.W. Bateson Co. Under Contract No.*

DACA21-71-C-0061, ASBCA No. 19823 (July 26, 1976).[1] The Board remanded the case to the contracting officer for determination of the amount to which petitioner was entitled.

Petitioner then revised its claim to $2,963,325 (Pet. App. 33). After protracted negotiations failed to produce a settlement, the contracting officer determined that petitioner was entitled to additional payment of $228,867. On appeal to the Board, petitioner called several officers of Fidelity Sound as witnesses (Pet. App. 35). The government's witnesses included government auditors, engineers, and the contracting officer's representative for electrical matters, Robert E. Utermark (Pet. App. 36). The Board increased the amount of the equitable adjustment to $234,536. *In re J.W. Bateson Co. Under Contract No. DACA21-71-C-0061*, ASBCA No. 22337 (Oct. 27, 1978).[2]

2. Petitioner sought review in the Court of Claims, specifically challenging only the Board's determination of the number of extra hours of labor necessary for the installation of the Executone equipment, and the Board's denial of claimed interest costs, extraordinary damages, and damages for delay alleged to have been caused by the arbitrary and capricious denial of the nurse call system proposals submitted by Fidelity (Pet. App. 40). The government argued that the Board's decision was correct as a matter of law, supported by substantial evidence, and, therefore, final

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[1]The Board's decision on liability is reproduced as Appendix D to the government's brief in the Court of Claims.

[2]The Board's decision on the amount of the equitable adjustment is reproduced as Appendix E to the government's brief in the Court of Claims.

under the limited judicial review provisions of the Wunderlich Act, 41 U.S.C. 321, 322.[3] In opposing the government's motion for summary judgment, petitioner modified its claims, adding arguments in support of the remaining items of its claim denied by the Board. Alternatively, petitioner sought de novo review of its contract claims asserting that the rejection of the proposed nurse call systems submitted by Fidelity, before the Executone system was approved, constituted a breach of contract. Petitioner argued that the rejections of its first few proposals were made in bad faith by the government's representative, and that the government in requiring the use of the Executone system had made a cardinal change outside the scope of the contract (Pet. App. 40-42).

The trial judge concluded that petitioner had not "established any basis upon which it could be ruled that a cardinal change claim[] ha[d] been asserted in this matter calling for *de novo* proceedings" (Pet. App. 43). The trial judge also found petitioner's general allegations of bad faith insufficient to create a triable issue of fact calling for trial de novo. Accordingly, he did not reach the question of whether the

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[3]Section 321 provides:

> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however*, That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 322 further provides that "[n]o Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board." See also 41 U.S.C. (Supp. III) 609(b).

breach of contract claim could be asserted notwithstanding petitioner's failure to present the claim to the Board (Pet. App. 43 n.5). The trial judge then concluded that the Board decision was final under the Wunderlich Act, 41 U.S.C. 321, 322 (Pet. App. 46). The Court of Claims agreed with the recommended decision of its trial judge and granted the government's motion for summary judgment (Pet. App. 22). Petitioner's motion for rehearing was denied.

3. Petitioner's due process claims were never raised in the Court of Claims and, therefore, should not be considered by this Court. See, *e.g.*, *Jenkins* v. *Anderson*, 447 U.S. 231, 234-235 n.1 (1980); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, the claims are frivolous and are essentially attempts to avoid the consequences of petitioner's failure to prove its claim for damages in the administrative proceedings.

a. Petitioner claims that the administrative procedure for resolving contract disputes is inadequate because it does not permit resolution of all disputes under the contract. In the proceedings before the Board, petitioner had ample opportunity to submit argument and relevant evidence on all its claims, as well as an opportunity to rebut the government's opposing arguments. Petitioner's first due process claim is no more than a challenge of the Board's factual findings with respect to the amount of the equitable adjustment.

The findings of the Board are supported by substantial evidence and are subject to only limited judicial review. *United States* v. *Callahan Walker Construction Co.*, 317 U.S. 56, 61 (1942). *Koppers Co.* v. *United States*, 405 F. 2d 554 (Ct. Cl. 1968). The Court of Claims properly concluded that petitioner had failed to establish any basis for overturning the Board's decision as to the appropriate burden rate

(Pet. App. 50). Petitioner's claim for the additional cost of using electricians instead of its own technicians was also properly denied because petitioner failed to show that the government's action required the use of electricians. The Board correctly rejected the "total cost" method for determining the extra hours of labor necessary to install the Executone system because the amount of excess labor related to the change could be more accurately determined by other methods (Pet. App. 53-54). As to the claim for additional costs for the time and travel of petitioner's officers allocable to the contracting officer's interpretation of the nurse call specifications, the court properly deferred to the Board's assessment of the witnesses' credibility. See *Sternberger* v. *United States*, 401 F. 2d 1012 (Ct. Cl. 1968). Petitioner offered no documentary evidence at all in support of this part of its claim (Pet. App. 53-54). The Court of Claims noted the claims based on legal costs and lost contract bids were correctly rejected, although petitioner did not specifically argue these points (Pet. App. 57-59).[4]

b. Petitioner asserts that the government intentionally prevented it from meeting its burden of proof on its claims. By this, petitioner apparently means that the wrongful

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[4]Petitioner's belated breach of contract claim was fully addressed in the Court of Claims. The trial judge found that petitioner's allegations would not support a motion for trial de novo since petitioner had failed to establish a sufficient basis to invoke the cardinal change doctrine. The contract in issue called for a nurse call system. The contracting officer's erroneous interpretation of the specifications did not result in an "alteration in the work so drastic that it effectively require[d] the contractor to perform duties materially different from those originally bargained for," and therefore did not constitute a cardinal change (Pet. App. 44). See *Edward R. Marden Corp.* v. *United States*, 442 F. 2d 364 (Ct. Cl. 1971). The equitable adjustment awarded by the Board provided the appropriate relief for any increased cost incurred by petitioner as a result of being required to use a particular brand name of equipment, Executone, when other equivalent equipment would have met the contract specifications (Pet. App. 45). *Jack Stone Co.* v. *United States*, 344 F. 2d 370 (Ct. Cl. 1965).

rejections of its proposals by the contracting officer were intended to and did drive it out of business, which in turn resulted in the loss of its records (Pet. 11, 16). Petitioner does not explain how or why that resulted in the loss of any records it may have had to help prove its claim. There is no charge that the government had control of petitioner's records. Even assuming that the allegedly lost records would have satisfied petitioner's burden of proof, petitioner's failure to explain its own apparent carelessness in preserving those records is dispositive of this claim. As the Board reasonably noted, "[n]o matter how carelessly books and records are maintained or moved from place to place, reason and common sense decree that the records that relate to an unsettled claim will be retained." *In re J. W. Bateson Co.*, ASBCA No. 22337, *supra*, at 12. In any event, even if petitioner's tenuous reasoning set forth a legal cause of action, such a cause of action sounds essentially in tort and is therefore outside the statutory authority of the Court of Claims. 28 U.S.C. 1491.[5]

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[5]Finally, although it is far from clear, petitioner seems to assert that the administrative procedure for dispute resolution is generally inadequate and therefore violative of due process, notwithstanding the provisions for judicial review. See Pet. 12-15. As this Court's decisions make plain, however, parties competent to contract are also competent to agree to administrative dispute resolution (with the scope of judicial review prescribed by statute). See *United States* v. *Moorman*, 338 U.S. 457, 461-462 (1950), *Kihlberg* v. *United States*, 97 U.S. 398 (1878); see generally *S & E Contractors, Inc.* v. *United States*, 406 U.S. 1, 8-10 (1972); *id.* at 20-22 (Blackmun, J., concurring).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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